

IN THE

# UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

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WM. J. BRYAN, JESSE D. CARR, WILLIAM  
MATTHEWS, HENRY MILLER, AND WM. F.  
HERRIN; A. N. DROWN, AND VANDERLYN  
STOW, as Executors of the Last Will of W.  
W. Stow, deceased,

*PLAINTIFFS IN ERROR,*

vs.

THE UNITED STATES OF AMERICA,

*DEFENDANT IN ERROR.*

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## Brief of Plaintiffs in Error.

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Attorneys for Plaintiffs in Error.

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Error to Circuit Court of the United States,  
Ninth Circuit, Northern District of California.

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WM. J. BRYAN, JESSIE D. CARR,  
WILLIAM MATTHEWS, HEN-  
RY MILLER AND WM. F. HER-  
RIN, A. N. DROWN, AND VAN-  
DERLYN STOW, as Executors of  
the Last Will of W. W. Stow.

*Plaintiffs in Error.*

vs.

THE UNITED STATES OF  
AMERICA,

*Defendants in Error.*

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Brief of Plaintiffs in Error.

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STATEMENT OF THE CASE.

This suit is upon the official bond of the plaintiff in error, William J. Bryan, as Postmaster at San Fran-

cisco, California, to recover a balance of \$9,399.88 due on the money order sales in said office during his term of office. The following facts alleged in the complaint are admitted to be true by the amended answer:

That William J. Bryan was Postmaster at San Francisco, California, from June 21st, 1886, to June 30th, 1890. That said Bryan, as principal, and the other plaintiffs in error as sureties, executed and delivered the bond, a copy of which is attached to plaintiffs' complaint marked Exhibit "A," and made a part thereof, at the time, in the manner, for the amount, for the purpose, upon the conditions and to the effect as alleged in the complaint.

That on the 30th day of June, A. D. 1890, there was due the United States upon the money order account at the Postoffice at San Francisco, California, the sum of \$9,399.88.

That said William J. Bryan did not at the date last aforesaid nor has he at any time since or at all, paid said sum or any part thereof.

That the Treasury Department, on April 30th, 1892, adjusted the accounts of said Bryan as Postmaster, and reported the said sum of \$9,399.88 to be due the United States.

That said sum has been demanded of plaintiffs in error, but that they and each of them have neglected and refused to pay the same or any part thereof.

That plaintiffs in error are residents of the Northern District of California.

The following facts alleged in the complaint are specifically denied by the amended answer, to-wit:

“ And the said plaintiff further avers that the said  
 “ William J. Bryan did not well and faithfully execute  
 “ and discharge the duties and trusts imposed on him  
 “ as such Postmaster, either by law or the rules  
 “ and regulations of the Postoffice Department, and  
 “ did not once in three months or oftener, when re-  
 “ quired, faithfully or otherwise render an account of  
 “ his receipts and expenditures as such Postmaster to  
 “ to the Postoffice Department in the manner and  
 “ form prescribed by the Postmaster General in his  
 “ several instructions to Postmasters, and did not pay  
 “ the balance *of all moneys that came into his hands*  
 “ in the manner prescribed by the Postmaster Gen-  
 “ eral of the United States for the time being or  
 “ otherwise.

“ And the said plainfiff assigns as a breach of the  
 “ conditions of the said writing obligatory that the  
 “ said William J. Bryan, while he was Postmaster as  
 “ aforesaid, did from time to time in his official  
 “ capacity as such Postmaster, collect and receive  
 “ divers sums of money on his money-order account,  
 “ for which he neglected to render his account to the  
 “ Postoffice Department in the manner and form or  
 “ otherwise as prescribed by law; which sums of  
 “ money so received on his money-order account, and  
 “ not accounted for as aforesaid on the thirtieth day  
 “ of June, one thousand eight hundred and ninety,

“ amounted to the sum of nine thousand three hundred and ninety-nine dollars and eighty-eight cents.”

The denials of the foregoing allegations are as follows:

#### IV.

“ Defendants deny that said William J. Bryan did not well or faithfully exercise or discharge the duties or trusts imposed upon him as such Postmaster, either by law or the rules or regulations of the Postoffice Department; deny that said William J. Bryan did not once in three months, or oftener when required, faithfully, or otherwise, render an account of his receipts and expenditures as such Postmaster, to the Postoffice Department, in the manner and form prescribed by the Postmaster General, in his several instructions to Postmasters.

“ Defendants deny that said William J. Bryan did *not pay the balance of all moneys* that came into his hands on money order account in the manner prescribed by the Postmaster General; but, on the contrary, defendants aver that said William J. Bryan well and truly and faithfully exercised and discharged all the duties and trusts imposed on him as such Postmaster either by law or the rules and regulations of the Postoffice Department, and did faithfully render an account of his receipts and expenditures as such Postmaster to the Postoffice Department, in the manner and form prescribed by the

Postmaster-General, in his several instructions to postmasters, and did pay to the United States *all moneys that came into his hands*, on his money order accounts, in the manner and form prescribed by law and the rules and regulations of the Postmaster General to postmasters."

## V.

"These defendants deny that William J. Bryan, while he was Postmaster at San Francisco, State and Northern District of California, in breach of the conditions of said bond, or from time to time, or at all, in his official capacity as such Postmaster, or at all, did collect or receive divers or any sums of money on his money order account, or at all, for which he neglected to render his accounts to the Postoffice Department, in the manner and form, or manner or form prescribed by law, or at all; but, on the contrary, defendants aver that said defendant William J. Bryan accounted for and paid over to the United States, all money received by him, on his money order account, while Postmaster aforesaid, and faithfully accounted for all money orders which he, as Postmaster or agent, as aforesaid, received, for the use and benefit of the said Postoffice Department.

See pages 22 and 23 of the printed Record.

By way of defense the following facts are in substance and effect set forth in the amended answer and stand undisputed:

That James S. Kennedy was a clerk in the Post-office at San Francisco when Wm. J. Bryan took office, and continued to hold such clerkship until some time in the spring of 1890. That said Kennedy took and held said clerkship under the Civil Service laws of the United States and the rules and regulations adopted pursuant to said law governing the appointment, promotion and tenure of said office, and as such clerk had charge of the money order accounts and money order funds of said Postoffice; that said Kennedy, between the 5th day of January, 1890, and the 15th day of March, 1890, *received, collected,* embezzled and converted to his own use divers sums of the money order funds of said Postoffice, which said several sums aggregated \$9,399.88 and is the same for which this suit is brought.

That said Kennedy was, on the 8th day of April, 1890, indicted by the United States Grand Jury in and for the United States District Court for the Northern District of California for said embezzlement of said funds, and thereafter on the 13th day of May, 1890, was convicted of said crime.

That William J. Bryan, as Postmaster, used all the diligence and supervisory care over said Kennedy that a prudent, painstaking chief officer could over a subordinate officer to protect the United States, and to secure the faithful discharge of his duties as such clerk, and had no knowledge or intimation of the misappropriation of said money order funds by said Ken-



nedly until after said crime had been fully consummated.

That said Bryan never at any time, nor has he yet *received*, said money order funds, or any part thereof so misappropriated, stolen and embezzled by said Kennedy, and said money order funds were lost to the United States without the fault or negligence of said Bryan.

*That said Kennedy under the rules and regulations of the Postoffice Department was in the custody and charge of the money order funds of the international money order desk in said Postoffice at the time said funds were embezzled by him as aforesaid, and said funds NEVER CAME INTO THE HANDS OF DEFENDANT BRYAN AS POSTMASTER OR OTHERWISE.*

By way of emphasizing the fact that plaintiff in error, Bryan, was in no manner at fault, it is alleged in substance in the amended answer, and not denied, that the business and work of the international money order desk in said Postoffice had increased nearly one hundred per cent and the clerical force was entirely inadequate to do the work and meet the requirements of the rules and regulations at the time said Kennedy embezzled said funds, and that Bryan had from time, to time, for eighteen months prior thereto, made urgent appeals to the Postmaster-General for additional clerical help, but his appeals were ignored and denied.

That had he been furnished or permitted to employ an adequate clerical force to keep up the work at the

international money order desk in manner and form required by the rules and regulations Kennedy could not have embezzled said funds or any part thereof without immediate detection.

See pages 24, 25 and 26, Record.

In this state of the pleadings defendant in error interposed a demurrer to the amended answer upon the following grounds:

That the facts therein stated were not sufficient to constitute a defense to the cause of action set forth in the complaint.

That the facts stated in the amended answer were not sufficient to constitute a counter claim to the cause of action set forth in this complaint.

The demurrer was sustained by the Court below and judgment rendered in favor of defendant in error as prayed for in the complaint.

#### ERRORS RELIED UPON ARE:

A. That the Court below erred in sustaining the first ground of the demurrer interposed to the amended answer, and by adjudging and deciding that said amended answer does not state facts sufficient to constitute a defense to the cause of action in the plaintiffs' complaint contained.

B. That the Court below erred in sustaining the second ground of the demurrer interposed to the amended answer, and by adjudging and deciding that

said amended answer does not state facts sufficient to constitute a counter-claim to the cause of action in plaintiffs' complaint contained.

C. That the Court below erred in giving judgment on the pleadings in said cause against plaintiffs in error, and that said judgment is contrary to the facts as stated in the pleadings and the law of the case.

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## ARGUMENT.

The effect of the Demurrer to the Amended Answer is the same as a motion for judgment on the pleadings.

Judgment on the pleadings ought not to have been given, because the allegations of the complaint that  
*“ the said William J. Bryan did not well and faithfully  
 “ execute and discharge the duties and trusts imposed on  
 “ him as such Postmaster \* \* \* and did not once  
 “ in three months or oftener when required, faithfully or  
 “ otherwise render an account of his receipts and expend-  
 “ itures \* \* \* and did not pay the balance of all  
 “ moneys THAT CAME INTO HIS HANDS” \* \* \**

And the further allegations of the complaint assigning the breach of the conditions of the bond sued on, viz.: “ That the said William J. Bryan, while  
 “ he was Postmaster as aforesaid, did, from time to  
 “ time, in his official capacity as such Postmaster,  
 “ collect and receive divers sums of money on his money

“ order accounts for which he neglected to render his  
 “ accounts \* \* \* which sums of money so received  
 “ on his money order account and not accounted for  
 “ as aforesaid on the 30th day of June, 1890, amounted  
 “ to the sum of \$9,399.88,” etc. (see Complaint,  
 Record, pages 5 and 6), are specifically denied by the  
 answer (see pp. IV and V of the Amended Answer,  
 pages 22 and 23 Record), and are also denied by the  
 following averment in the amended answer: “ Nor  
 “ did said Bryan at any time receive, nor has he yet  
 “ received said money order funds, or any part thereof,  
 “ so misappropriated, stolen and embezzled by said  
 “ Kennedy.” (See concluding part of pp. VI of  
 Amended Answer; Record, page 25, also pp. IX;  
 Record, page 26.)

If there is any one or more of the material allegations of the complaint denied by the amended answer the demurrer should not have been sustained nor should judgment have been entered on the pleadings. Judgment on the pleadings cannot be rendered in favor of plaintiff when any of the material allegations of the complaint are denied.

*Reich vs. Rebellion Silver Mining Co.*, Vol. 2 Pac. Rep., 703.

*Miles vs. McCallan*, Vol. 3 Pac. Rep., 610.

*Prost vs. More*, 40 Cal., 347.

*Hicks vs. Lowell*, 64 Cal., 14.

If there is a denial and also new matter of defense alleged which admits the allegations of the complaint,

plaintiff cannot have judgment on the pleadings on that account.

*Nudd vs. Thompson*, 34 Cal., 46.

*Bott. vs. Vandarment*, 67 Cal., 332.

*Martin vs. Porter*, 84 Cal., 479.

*Was Postmaster Bryan responsible for the malfeasance of Clerk Kennedy by reason of the obligation arising from his official position and aside from such a bond as exists in this case?*

The answer is, no.

“ The general rule of official obligation, as imposed  
 “ by law, is that the officer shall perform the duties  
 “ of his office honestly, faithfully and to the best of  
 “ his ability. This is the substance of all official  
 “ oaths. In ordinary cases to expect more than this  
 “ would deter upright and responsible men from tak-  
 “ ing office. This is substantially the rule by which the  
 “ common law measures the responsibility of those  
 “ whose official duties require them to have the cus-  
 “ tody of property, public or private. If in any case  
 “ a more stringent obligation is desirable, it must be  
 “ prescribed by Statute or exacted by express stipu-  
 “ lation.”

*United States vs. Thomas*, 15 Wall., p. 343.

Kennedy was an officer of the United States. He held his position not by the sufferance or appointment of Bryan but under the Civil Service Law of the United States and the rules and regulations

adopted pursuant to said law governing the appointment, promotion and tenure of the office he held.

*United States vs. Hartwell*, 6 Wall., 392.

Postmaster Bryan and Clerk Kennedy were both servants of the same master and each under a personal responsibility to the Government.

*Dunlap vs. Monroe*, 7 Cranch., 242.

Kennedy was employed in the public service of the United States. He held his position pursuant to law. The tenure of his position was not dependant upon that of his superior, the Postmaster. Vacating the office of his superior and the induction into office of another Postmaster would not have affected the tenure of his place.

*United States vs. Hartwell, supra.*

Bryan, while Postmaster, had supervising control over him, nothing more.

But it is alleged and admitted to be true: That  
 “ Bryan as Postmaster used all the diligence and  
 “ supervising care over Kennedy that a prudent,  
 “ painstaking chief officer could over a subordinate  
 “ officer to protect the United States and to secure the  
 “ faithful discharge of his duties as such clerk and  
 “ had no knowledge or intimation of the misappropriation of said money-order funds by said Kennedy until after said crime had been consummated.”

Amended Answer Record, page 25.

It is further alleged that said funds were embezzled by Kennedy and lost to the United States without the fault or negligence of Bryan.

P. VII Amended Answer Record, page 25.

In speaking of the responsibility of Postmasters for the acts of their subordinate, Judge Story in his work on bailments says:

“ If an action should be properly framed for the  
 “ purpose of charging the Deputy Postmaster with the  
 “ default of the clerks or servants in office under him,  
 “ it seems that his liability in such an action will de-  
 “ pend upon the question *whether he has in fact been*  
 “ *guilty of any negligence in not properly superintending*  
 “ *them in the discharge of their duties in his office.* For  
 “ it has been held that a Deputy Postmaster is respon-  
 “ sible only for the neglect of ordinary diligence in  
 “ the duties of his office, which consists in the want  
 “ of proper attention to his duties in person or by his  
 “ assistants, if he has any, or in the want of that care  
 “ which a man of common prudence would take of  
 “ his own affairs. *He is not, therefore, responsible for*  
 “ *any losses* occasioned by the negligence or delinquen-  
 “ cies, or *embezzlements of his* assistants if he exercises  
 “ a due and reasonable superintendence over their  
 “ official conduct and he has no reason to suspect  
 “ them guilty of any negligence or malconduct. In  
 “ short, such assistants are not treated as strictly his

“ private servants; but in some sort, as *public officers*,  
 “ *although appointed by him.*”

*Story on Bailments*, sec. 463, pages 428-9, 9th ed.  
*Schroyer vs. Lynch*, 8 Watts, 453.

If this was the law when Postmasters appointed their assistants, how much more unreasonable to hold them responsible for assistants and clerks whose appointments or tenure of office they cannot control.

In speaking of the responsibility of Postmasters Justice Story in his work on Agency says: “ They are  
 “ not responsible, *either to the Government itself*, or to  
 “ third persons, for the misfeasance, or negligence, or  
 “ omissions of duty of the sub-agents, clerks and serv-  
 “ ants so employed under them, unless, indeed, they are  
 “ guilty of ordinary negligence at least in *not selecting*  
 “ persons of suitable skill, or in not exercising a rea-  
 “ sonable superintendence and vigilance over their  
 “ acts and doings.”

*Story on Agency*, sec. 319a, page 392--9th ed.

To the same purport is sections 319<sup>b</sup>-321, same author.

*Lane vs. Cotton*, 1 Ld. Ryan, 646.

*Whitefield vs. Le Despencer*, Comp, 754.

The conditions have changed since Justice Story wrote upon these subjects. Then Postmasters appointed their clerks and assistants. Now clerks and assistants hold their positions independently of the Postmaster, and the promotion and tenure of their



position is governed by the Civil Service law of the United States. If, as stated in the text by Justice Story, Postmasters were not responsible for the misappropriation of their clerks and assistants when they were of their own selection and appointment, how much more reason there is for holding them free from such responsibility under present conditions.

The case is now put on a footing likened unto officers in the Army and Navy.

Postmasters must take such clerks and assistants as they find in the service. They have no power of appointment or dismissal.

They must perform their duties with the aid and assistance of clerks and assistants stationed there and holding their positions by the same and equal authority with themselves.

But the rule applied to public officers in the Army and Navy is that each is liable for his own acts, but not for the misfeasance and negligence of the subordinates under them, who, indeed, are not ordinarily appointed by them, but are appointed by the Government itself.

*Storey on Agency*, Sec. 322, page 398, 9th ed.

*Nicholson vs. Mounsey*, 15 East., 384.

Attorney-General Brewster, in a case involving the liability of a Postmaster for the wrongful acts of his assistants and clerks, after reviewing the law, said: "I am of the opinion that a Postmaster is not liable for money appropriated by his assistants, either to

“ the party who placed it in the hands of the latter, or  
 “ to the Government.” Ops. Attorney-General, page  
 526.

Assistant Attorney-General James N. Tyner, in  
 1892, had the same question under consideration and  
 came to the same conclusion. In the course of his  
 opinion to the Postoffice Department he said: “ It is  
 “ a well-settled principle of law both in England and  
 “ the United States that the Postmaster-General, the  
 “ *local Postmasters* and their assistants and clerks ap-  
 “ pointed and sworn as required by law are public  
 “ officers, each of whom is responsible for his own  
 “ defaults, and *for his own defaults only, and not for*  
 “ *those of any of the others*, although selected by him  
 “ and subject to his orders (*Keenan vs. Southworth*, 110  
 “ Mass., 473, 14 Am. Rep., 613; *Lane vs. Cotton*, 1 Ld.  
 “ Ryan, 646; *Whitefield vs. Ford Le Despencer Cowp*,  
 “ 754; *Dunlop vs. Muro*, 7 Cranch., U. S., 242; *Bishop*  
 “ *vs. Williamson*, 11 Me., 495), unless he has appointed  
 “ or retained unfit or improper persons \* \* \* or  
 “ has so carelessly conducted the affairs of his office  
 “ as to furnish opportunity for such default.” (United  
 States Postal Guide, May, 1892, pages 10 and 11.)

*If Postmaster Bryan was not responsible for the mal-  
 feasance of Kennedy arising from his official position,  
 did he and his sureties become so by the terms and express  
 stipulations of the bond sued on?*

Let us look to the bond for an answer. The con-  
 dition of the bond is as follows:

“ Now the condition of this obligation is such that  
 “ if the said William J. Bryan shall faithfully dis-  
 “ charge all the duties and trusts imposed on him  
 “ either by law or by the rules and regulations of the  
 “ Postoffice Department and faithfully once in three  
 “ months, or oftener, if thereto required, render ac-  
 “ counts of his receipts and expenditures \* \* \*  
 “ *and shall pay the balance of all moneys* THAT SHALL  
 “ COME INTO HIS HANDS from postage collected \* \* \*  
 “ or *money-orders* issued by him \* \* \* and shall  
 “ also faithfully do and perform all of the duties and  
 “ obligations imposed upon or required of him by  
 “ law or the rules and regulations of the Department  
 “ in connection with the money-order business \*  
 “ \* \* then the above obligation shall be void,  
 “ otherwise of force.”

See copy of bond Record, pages 8 and 9.

The obligation arising from the bond because of the conditions therein stipulated is two-fold—that Bryan shall faithfully discharge his official duties and that he shall pay the balance of all moneys *that shall come into his hands*.

The contention is that the phrase and “ shall pay the balance of all moneys that shall come *into his hands*,” etc., creates an obligation to pay *at all events*, and this condition is supported by the earlier decision of the United States Supreme Court. *But pay what? All moneys that shall come into his hands*, all moneys *received by him* from the sources named in the bond.

The bond is the measure of his responsibility or rather liability. "The condition of an official bond " is collateral to the obligation or penalty. It is not " based on a prior debt, nor is it evidence of a debt; " and the duty secured thereby does not become a debt " *until default be made on the part of the principal.*"

*United States vs. Thomas*, 15 Wall., 351.

Two things must occur, then, to make him liable. He must *receive moneys* and he must fail to pay—before the condition attaches.

But as we have seen Postmasters are not responsible for the negligence or malfeasance of their assistants or clerks by reason of their official position, and can only be made so by express provision of Statute or by special contract, that is, by *express stipulations in the bond*.

The contract of the surety must be strictly construed in his favor. Courts see to it that his liability is not enlarged beyond the strict letter of his undertaking. His liability is not to be extended by implication.

Testing the conditions stipulated in the bond, the terms used by these rules, where is there to be found apt or sufficient language even to rest an implication that Bryan and his sureties undertook to make good moneys received and misappropriated by his clerks and assistants, and which *never came into his (Bryan's) hands?*

In view of the fact that the law fixing his responsibility *officially* does not hold him responsible for the negligence and malfeasance of his clerks, we would expect to find plain and explicit language in the conditions of the bond, extending and enlarging his responsibility, so as to make him and his sureties liable for their negligence and malfeasance. It is not in the bond that Bryan and his sureties shall pay the balance of *all moneys that shall come into his or their hands*.

Kennedy was an officer of the United States, and so far as this case is concerned, under the admitted facts, had charge of the money order funds and money order accounts, and *received, collected and embezzled* the moneys sought to be recovered of these plaintiffs in error. (Amended Ans. Record, page 24.) “Nor did said Bryan at any time receive, nor has he yet received, said money order funds or any part thereof.” (Record, page 25.)

The sureties in the obligation sued upon became sponsors for the honesty and integrity of William J. Bryan, and obligated themselves to pay to the Government all moneys “*that shall come into his hands which he might fail to pay.*”

The liability of the sureties for the acts and embezzlement of Kennedy is not found in the stipulation of the bond. It must be looked for outside of the terms of their writing obligatory. There must be found some statute then in force extending and enlarging their liability beyond the express stipulations

of the bond. Counsel for the Government cited and the Court below in its opinion quotes Section 4029 R. S. U. S., as extending the liability of plaintiffs in error under the bond sued on to account for moneys received by clerks, etc.

That section authorizes Postmasters where there are branch postoffices or stations established, to issue or cause to be issued *by any of his assistants or clerks IN CHARGE of branch postoffices or stations* postal money orders, payable, etc., and provides: "And the Postmaster and his sureties shall, in every case, be held accountable upon his official bond for all moneys received by him or his DESIGNATED *assistants or clerks in charge of stations* from the issue of money orders and for all moneys which may come into *his* or THEIR hands, or be placed in *his* or THEIR custody by reason of the transaction by them of money order business."

It is evident that the bond sued on in this case in the form executed did not cover *assistants and clerks in charge of stations and branch postoffices*, and but for the Statute neither the Postmaster nor his sureties would have been accountable for moneys misappropriated by them.

This is the only Statute cited by counsel for the Government and is the only one I am aware of extending the conditions stipulated in the Postmaster's bonds and holding them and their sureties accountable for moneys received by *assistants and clerks*.

But this section only applies to *assistants and clerks* DESIGNATED by Postmasters and *put in charge of branch postoffices or stations*. It is evident Congress concluded that under the general form of Postmasters' bonds that Postmasters and their sureties *were not liable* for moneys received by *assistants and clerks* else why so declare by Statute?

In extending the liability, the Statute limited it to assistants or clerks *designated* by postmasters and in in charge of branch postoffices or stations.

It gave Postmasters the right to select those they should become accountable for.

It appears as a fact in this case that Kennedy was not a *clerk or assistant in charge* of a *branch postoffice or station*, but was a clerk in the postoffice at San Francisco, and that he was not *designated* by the Postmaster, plaintiff in error Bryan, but held his position through and by reason of the Civil Service laws and the rules and regulations governing the appointment, promotion and tenure of said clerkship. (See p. VI Amended Answer, Record, page 24.)

As if pointing the limited construction I claim should be given to the phrase "all moneys that shall come into HIS HANDS," used in the forms of Postmasters' bonds, the statute just cited treats the words "*his hands*" as meaning the hands of the person of the Postmaster—that is, moneys in his personal control—for in extending the liability under Postmasters' bonds it provides for "*all moneys which may come into*

HIS or THEIR *hands* or be placed in *his or THEIR* custody.”

It is alleged as a fact in the amended answer, that Kennedy was in charge of the money-order accounts and money-order funds and that he embezzled the funds for which this suit was brought.

Section 4046 R. S. U. S., under which he was convicted, recognizes the personal possession of money-order funds by clerks, assistants, etc., as distinguished from the possession by the Postmaster.

The funds embezzled were in the *hands* of Kennedy and not in the *hands* of Bryan.

They were intrusted to Kennedy by the rules and regulations of the Department and the law recognized an independent trust in him.

Section 4046, *supra*, provides: “Every Postmaster, *assistant, clerk, etc.*, employed in or connected with “the business or operations of any money-order “office who converts to his own use \* \* any portion of the money-order funds shall be deemed “guilty of embezzlement \* \* and any failure to “pay over or produce any money-order funds IN- “TRUSTED to *such person* shall be taken as *prima facie* “evidence of embezzlement,” etc.

The contract of the surety must be strictly construed in his favor. His obligation is voluntary, without any consideration moving to him, without benefit to him, entered into for the accommodation of his principal; and Courts see to it that his liabilities



thus incurred are not enlarged beyond the strict letter of his undertaking. He has the right to stand upon the very terms of his contract.

*Anderson vs. Bellinger*, 13 Am. St. Rep., 47.

*Miller vs. Stewart*, 22 U. S. (9 Wheat.), 701.

*United States vs. Boyd*, 40 U. S. (15 Pet.), 208.

In the case last cited the Court say: "This Court, in *Miller vs. Stewart* (9 Wheat.), 702. held that the liability of a surety is not to be extended, by implication, beyond the terms of his contract; that his undertaking is to receive a strict interpretation, and not to extend beyond the fair scope of its terms, and the whole series of authorities proceeded on this ground."

The question presented in the case of *Harrar vs. U. S.*, 5 Pet., 373, was whether the bond covered past dereliction, and the Court holding that it did not, said, "If the contract is intended to cover a past dereliction, the bond should have been made retrospective in its language."

So we contend if the bond in suit was intended to cover delinquences of clerks, assistants, and others connected with the Postoffice over whose appointment, designation for duty, promotion or tenure of office Bryan had no control, then it should have been so nominated on the bond.

*Smith vs. U. S.*, 2 Wall., 235.

I do not contend but that the liability of Bryan and his sureties might have been so enlarged by special contract stipulated in the bond, or by statute as to cover the case at bar, but I contend it was not done.

The mere defining his duties without more cannot be regarded as enlarging, or in anyway affecting his responsibility.

*U. S. vs. Thomas*, 15 Wall., 345.

The case at bar is not that the money was stolen from Bryan, as in the cases of *United States vs. Prescott*, 3 Howard, 578, or *United States vs. Dashiels*, 4 Wall., 185, or of *United States vs. Keeler*, 9 Wall., 83, where the money was voluntarily paid over to a creditor of the Government without authority; or of *United States vs. Boyden*, 13 Wall., 17, where a receiver of public moneys was violently robbed, or *United States vs. Bevans*, 13 Wall., 56, where a receiver of public moneys had moneys forcibly taken from him by agents of the Confederate States, nor yet of *United States vs. Thomas*, 15 Wall., 337, where the public enemy seized and forcibly took the public moneys from him. In each of these cases there was no question but that the moneys had come into *the hands* of the officers, and were taken from them either by theft, robbery or by force of a public enemy.

It is true in the case at bar that the theft by Kennedy is set forth as a defense, but it presents a two-fold purpose—to show that the moneys never came

into the hands of Bryan and that Kennedy was an officer of the United States, intrusted with the moneys by authority of law, and while rightfully in possession of them and before accounting to Bryan for them, appropriated them to his own use—embezzled them.

Respectfully submitted,

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